JD-128-97
New Haven, CT.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

YALE UNIVERSITY

and **34-CA-7347**

GRADUATE EMPLOYEES AND STUDENTS ORGANIZATION (GESO), A/W HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Darryl Hale, Esq. and Jennifer F. Creaturo, Esq., for the General Counsel.
Saul G. Kramer, Esq., Edward A. Brill, Esq., and Lloyd B. Chinn, Esq., (Proskauer Rose LLP) and Dorothy K. Robinson, Vice President and General Counsel and Jonathon E. Clune, Assistant General Counsel, Yale University, for the Respondent.
Richard G. McCracken, Esq., and Michael T. Anderson, Esq., (Davis, Cowell & Bowe) for the Charging Party.

DECISION and ORDER

Statement of the Case

Michael O. Miller, Administrative Law Judge: The unfair labor practice charge herein was filed by Graduate Employees and Students Organization (GESO), a/w Hotel Employees and Restaurant Employees International Union, AFL-CIO, on January 11, 1996, as thereafter amended. Based thereon, a complaint was issued on January 31, 1997 and amended on March 14, 1997, by the Regional Director of Region 34 of the National Labor Relations Board. That complaint alleges that Yale University (Yale, the University or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening reprisals against graduate students serving as teaching assistants (TAs) and part time acting instructors (PTAIs) [1], and discriminatorily denied them future teaching assignments, because of their participation in what was termed a "grade strike." Yale's timely-filed answer denies the commission of any unfair labor practices.

Upon the close of the General Counsel's case-in-chief,[2] Respondent filed a motion to

[1] Hereinafter, the term "teaching fellow" will be used to refer to both the teaching assistants and the part time acting instructors.

[2] The General Counsel's case was heard over 15 days between April 14 and May 29, 1997; the 2400 page record includes the testimony of 31 individuals, past and present teaching fellows, and approximately 400 exhibits.

dismiss the complaint.[3] Both the General Counsel and the Charging Party have filed responses to that motion and Respondent has filed a brief in reply to their responses.

Based upon my careful consideration of the evidence presented thus far, and of the parties' briefs, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a Connecticut corporation with its offices and other facilities located in New Haven, Connecticut, is engaged in the operation of a private non-profit university. In the twelve-month period ending October 31, 1996, it derived gross revenues (excluding contributions which were not available for operating expenses) in excess of $1,000,000 and, in conducting its educational operations, it purchased and received at its New Haven, Connecticut facility, goods valued in excess of $50,000 directly from points located outside the State of Connecticut. While the employee status of the teaching fellows is an issue raised by the pleadings, Yale acknowledges that it the employer of other individuals who are employees within the meaning of the Act.[4] The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

II. Background

Yale University is one of the nation's oldest and most renowned educational institutions. Encompassed within the University are twelve schools, including Yale College, providing undergraduate education, and the Yale Graduate School of Arts and Sciences, where study

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[3] Upon review of the relevant precedent, I am satisfied that the granting of such a motion is appropriate where the General Counsel has failed, at that stage, to establish a *prima facie* violation of the Act. *Goodyear Tire & Rubber Co.,* 312 NLRB 674 (1993); *Sun Electric Corporation,* 266 NLRB 37 (1983); *Local Union 613, Electrical Workers,* 227 NLRB 1977.

[4] The Charging Party raised a novel issue, contending that I must resolve the issue of the employee status of the teaching fellows, as a jurisdictional matter, prior to any resolution of the merits, citing *Murray v. City of Pocatello,* 226 U.S. 318, 324 (1912), *Barnett v. Secretary of Veterans' Affairs,* 83 F.2d 1380, 1383 (Fed Cir. 1996) and other cases. Analysis of this issue requires its rejection. Jurisdiction is based upon the involvement of an employer who is engaged in commerce or in operations affecting commerce, as those terms are defined in the Act; that employer need not stand as an employer of those who are allegedly subject to the unfair labor practices set out in the complaint. See Sections 2(6), (7) and (9) of the Act. See also, *St. Clare's Hospital & Health Center,* 229 NLRB 1000, 1003-1004 (1977), wherein the Board, while finding that "housestaff," i.e., residents, interns and fellows, were "primarily students rather than employees," expressly disclaimed any intention to renounce its jurisdiction over such classifications, stating instead that it had determined that extending bargaining privileges to them would be contrary to "the best interest of national labor policy." Its disposition with respect to such individuals, it stated, was an exercise of its "discretionary authority," not a matter of its statutory jurisdiction. See also, *Hafadai Beach Hotel,* 320 NLRB 192, fn. 2 (1995), citing *Management Training Corp.,* 317 NLRB 1355, 1358 (1995) where the Board stated that it "will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards."

[5] The question of GESO's labor organization status is bound up in the issue of whether the TAs and PTAIs are statutory employees. That issue will not be addressed herein. For the purpose of this decision, I will assume, *arguendo*, that they are employees and that GESO is a labor organization within the ambit of Section 2(5) of the Act.

leads to the award of masters degrees in philosophy, the arts and the sciences and doctorates in philosophy, the Ph.D. degree. The graduate school community includes approximately 2500 students and 750 faculty.

The road to the coveted Ph.D. is long and arduous. Doctoral candidates typically spend six or seven years in its pursuit. During the first three years, they are principally engaged in required course work, the satisfactory completion of preliminary examinations and the selection and approval of their dissertation topics. Thereafter, they research their chosen topics (not infrequently changing directions or subjects), write and then submit their dissertations.

The road to the Ph.D. is also expensive. Tuition exceeds $16,000 per year, exclusive of living expenses. The rigors of the educational program, however, leave little opportunity for remunerative employment outside of the University. Indeed, outside employment is discouraged. To help defray their expenses, Yale provides or makes available to graduate students substantial financial assistance, with fellowships covering all or part of the tuition and loans and stipends for subsistence.

Additionally, Yale provides opportunities for the graduate students to serve as teaching assistants and part time acting instructors, primarily in their third and fourth years, but also both earlier and later in their student careers. The compensation for these services, based at least in part on the approximate amount of time (generally between 5 and 20 hours) and effort required, supplants (and sometimes supplements) the stipends and fellowships awarded upon admission to the graduate schools. With a few limited exceptions, service as a teaching fellow is not a degree requirement in any educational discipline. The amount of time a student may spend in teaching is expressly limited by the University's policies and students may be discouraged by their faculty advisors from spending too much time in teaching.

As teaching assistants, the graduate students assist faculty in the undergraduate programs. They sit in on the professors' lectures, conduct sections with smaller groups of undergraduates where they lead discussions of the course material, they help prepare quizzes, problem sets and examinations, they assign, correct and grade course work, including mid-term and final papers, exams and themes, they work closely with undergraduates to improve their writing skills, they conduct pre-examination reviews of the course work and proctor examinations and they meet individually with students to assist them in their work or answer their questions. The teaching assistants report the students' grades to the instructors, generally at the end of the semester in the form of a compilation of the final grade; some instructors require that the student work and grades be turned in as it is completed. PTAIs independently develop and teach their own courses and turn the final grades in to the Registrar.

The teaching fellows write letters of evaluation or recommendation when requested by their students. Whether or not the writing of recommendations and evaluations is a required function of a teaching fellow, it is a function regularly performed by, and expected of, them. They are better acquainted with the students through their 15-20 student sections than are the professors who address large numbers of students in lecture format. References to, and guidance for, the writing of such recommendations are set forth in at least two publications for teaching fellows, "The Teaching Fellows Handbook" and the student published "Becoming Teachers" handbook. In the 1995-1996 edition of the former, at page 45, it states: "Although you need not feel compelled to write a recommendation when asked (especially if you cannot give the student unqualified support), it is entirely appropriate to agree to such requests, and most Teaching Fellows do so. Indeed, this is yet another introduction to a standard and intrinsic part of the teaching profession."

Perhaps as many as 75 percent of the graduate students will seek teaching positions upon completion of their courses of study. A somewhat smaller percentage will succeed in securing teaching positions at the college or university level. It is clear, and acknowledged by

some of the teaching fellows, that they gain valuable teaching experience as TAs and PTAIs. However, the material they teach is generally more basic than the work they are doing toward their doctorate and, for the most part, the teaching they do contributes little toward the body of knowledge they must acquire for that degree. Not infrequently, the courses in which they serve as teaching fellows are courses chosen by them to teach and may be similar to the courses they will be expected to teach if they are successful in securing teaching positions upon graduation. However, the record also reveals instances of students serving as teaching fellows in schools other than those in which they are enrolled. For example, law students with undergraduate concentrations in history teach in the history department, divinity students teach in the philosophy department and students from the architecture school teach in the art department. Law and Architecture are professional schools leading generally to careers in those professions rather than careers in academe. However significant their teaching functions may be to their own educational progress and career plans, it is abundantly clear that the the teaching fellows are a major resource for the University in providing undergraduate education.

Without exception, the graduate students I observed in these proceedings were bright, intelligent, articulate and sincere. As might be expected, they sought a larger role in the working aspects of their lives than they perceived had accorded been them by the University.[6] Out of this desire arose GESO, an organization of graduate students, at least some of whom are TAs and PTAIs.

GESO first sought Yale's recognition as the representative of the teaching fellows in 1992. In February of that year, it staged a three day strike wherein the teaching fellows refused to teach their classes. The strike was unsuccessful and recognition was not granted. In October of 1994, GESO sought an election among Yale's teaching fellows in the humanities and social sciences. This request was similarly denied. A second conventional strike, lasting a week, was conducted in April 1995. During that time, an election among the graduate students in the humanities and social sciences was conducted by the League of Women Voters. Although a majority of those students voted for representation, Yale continued to reject GESO's call for recognition.

In denying GESO's October 1994 request for an election, Yale's President, Richard Levin, set forth the University's position:

> The request that some of our graduate students be polled to determine whether they wish to be represented by an exclusive bargaining agent is based on the flawed premise that the primary relationship between the University and graduate students is that of employer to employee. Yale has consistently and correctly viewed study, research, and teaching as integral to the educational program of each graduate student. Acquiring teaching experience is, for most students, an important part of the Ph.D. program, and the faculty plays a major role in this aspect of a student's education and training. Moreover, there is and should be a direct educational relationship between a student and faculty member who serves as his or her teacher, research advisor, or supervisor in teaching. The effect of mandating the interposition of a third party, whether GESO or any other, into such a relationship would be to chill, rigidify and diminish it. Beyond these reasons, asking students to assume time-consuming tasks of negotiating and administering labor agreements would only divert their energies away from their primary responsibilities.

[6] Among other things, graduate students presently participate with faculty on committees which seek out junior faculty, develop guidelines for teaching fellowships, select and allocate teaching fellowships and hear student grievances against faculty.

In that letter, dated November 14, 1994, President Levin went on to point out that the NLRB considered "graduate students, even when teaching, primarily as students and not employees for the purposes of the National Labor Relations Act," excluding them from inclusion in bargaining units.[7]

His rejection of GESO's 1995 demand was more succinctly stated:

> It is my firm belief that relationships between teachers and students who will become professional colleagues could be profoundly damaged by the insertion of formal collective bargaining into the process of graduate education. The University's position on this issue has not changed and will not change.

The record is devoid of any evidence that the University's response to the prior, conventional, strikes resulted any unfair labor practice charges against it.

III. The Grade Strike

The GESO leadership began planning for the grade strike in mid-November, 1995.[8] At that time, a decision was made to recommend to the membership that they vote to withhold final grades until the Yale administration agreed to negotiate toward a written and binding agreement with GESO's elected representatives.

On December 7, GESO held a membership meeting. Following a description of the efforts, over five years, to secure recognition and bargaining from the Yale administration, and a review of their concerns,[9] the following motion was presented:

> Motion: We call upon the Yale Administration to sit down with our elected negotiating committee and to commit to signing a written and binding agreement. If I am a TA or PTAI, I will withhold my grades until the Yale Administration does so. If I am neither a TA nor a PTAI, I will not do the work of any striking TA or PTAI, nor will I take the job of any TA or PTAI who is denied work because he or she is striking.

In speeches by Michelle Stephens, GESO co-chair, and Andrew Rich, a member of GESO's organizing committee, it was explained that the strike participants would complete their work for the semester, holding both the grades for the exams and papers assigned during the semester and the grades for the final papers and exams until the demand for recognition and bargaining was met. It was suggested that they turn in their class materials and grade sheets to the GESO office. The speakers recognized that this would substantially burden the faculty, who would have to grade their own final exams and papers, and might particularly distress graduating seniors awaiting grades for employment or graduate school applications.

The GESO members voted to engage in the grade strike. The resolution was

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[7] In so stating, President Levin was apparently referencing the Board's decision in *St. Clare's Hospital and Health Center, supra.* I note that his reference to "teaching as integral to the educational program of each graduate student," which phrase is found in virtually every letter to the students concerning teaching fellowships and financial aid, as well as throughout the University's other literature, also appears to be derived from this decision (at page 1002).

[8] All dates hereinafter are between November 1995 and January 1996 unless otherwise specified.

[9] Among the issues of concern to the graduate students were recognition of the contribution they made to undergraduate education, appropriate compensation for the hours actually required to perform their teaching fellow duties, increased funding for teacher training and affordable health care.

announced to, and publicized in, the press. In its press release, GESO stated, "Grades are not due to the Registrar until January 2nd. The administration has almost a full month to begin negotiations . . ." The TAs were also asked to discuss the grade strike with the faculty members with whom they worked. At least one TA, Sarah Rich, testified that she told her department chairperson, Professor Mary Miller, that the students had voted "*that as of January 2, 1996*, they were going on strike and would not be turning in grades." (Emphasis supplied.) There is no question but that the Yale administration was aware of the intended grade strike by, or even before, December 7.

In the December 7 meeting, Andrew Rich suggested that the teaching fellows offer to write recommendations for the seniors to any of the institutions which would otherwise be receiving their grades. As late as December 28, Robin Brown, a GESO co-chair, wrote the parents of Yale's undergraduates, explaining that "the graduate teachers voted to withhold fall-semester grades until the Administration agrees to negotiate a binding agreement. . . " On behalf of the teaching fellows, she acknowledged the problem the absence of grades might pose for those who were applying to graduate schools and other similar programs; she offered to have "instructors . . . write detailed letters of evaluation for any student whose course grade is late or missing." She also noted that the final grades assigned by the professors in the absence of the teaching fellows' reporting of grades would not accurately reflect "mid-term and paper grades" which some professors were having students self-report, or would entirely fail to reflect such grades and be based upon the final exam alone.

Classes and exams ended about December 18; final grades were due to be submitted to the Registrar by January 2. According to the Teaching Fellows Handbook, the authority and responsibility for grades resides in the course instructors who are required to sign the grade sheets. The TAs are expected to turn in their grades to their course instructors in time for them to meet the deadline. PTAIs, as the course instructors, turn the grades in directly to the Registrar.

Following the December 7 vote and prior to January 2, the TAs continued to conduct their sections and/or review sessions. They also proctored exams, corrected and graded those exams when the faculty permitted them to do so, graded the papers students had turned in, calculated final grades and recorded those grades on to grade sheets. In some cases, they turned in the papers, exam books and grade sheets to the GESO office prior to January 2, where they were retained in a file cabinet with nominal security. Some of them were requested by their students to write letters of recommendation and apparently did so during this period and even after January 2. Those who participated in the grade strike did not turn their final grades (i.e., the compilation of the various grades earned during the semester) to either their professors or the Registrar before the due date.

In many cases, the assignments for teaching positions for both the fall and spring semesters are made in the prior spring (subject to changes due to class enrollments and other exigencies). Some TAs receive assignments to serve as the TA for successive portions of the same course over the two semesters. In other cases, they are assigned to distinct courses or do not receive their teaching assignments for the spring semester until some time in the fall. The teaching fellows prepared to teach the courses they had been assigned for the spring semester and fully expected to teach those courses even in the highly probable event that the grade strike was still continuing. That was stipulated to in this hearing[10] and abundantly clear

[10] The language of that stipulation, that "the intent was, if permitted, [that the teaching fellows] would continue to teach even if the grade strike was still ongoing" and that the the grade strike "was solely to withhold grades and not to withhold teaching services in the second semester," is clear. The context of that stipulation, questions to a witness as to her intent to

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from the record. Thus, the strike resolution, itself, calls upon graduate students without teaching responsibilities to refrain from "tak[ing] the job of any TA or PTAI *who is denied work because he or she is striking."* (Emphasis supplied.) And, the questions teaching fellows asked various administrators and faculty members, concerning what the impact of the grade strike might be upon their teaching assignments for the next semester, demonstrated their intention to teach in that semester even if the strike was on-going.

At least some GESO members and officers believed, as did the University, that the grade strike began upon its announcement on December 7. Thus, Gordon Lafer, GESO's Research Director (and a former Yale graduate student) referred, on January 17, to the "five weeks of the grade strike. . . " Michelle Stephens, GESO co-chair, testified that the grade strike "was . . . an action that kind of began from December 7." And, Nilanjana Dasgupta, in a note to her students on December 8, wrote that the "graduate student teachers *are* participating in a grade strike this semester . . . " (Emphasis supplied.)

Shortly after the announcement of the grade strike, Dean of the Graduate School Thomas Appelquist and Dean of Yale College Richard Brodhead wrote to all of the graduate students with teaching responsibilities in Yale College. Their letter argued against the propriety of such a tactic and warned of "the risk of serious consequences." It urged the TAs and PTAIs "to submit [their] grades in the usual manner." On January 4, the PTAIs were given a deadline of January 9 to turn in their grades.

On January 10, Dean Appelquist issued letters to the striking TAs, stating:

> If you are deliberately withholding grades. . . I urge you to reconsider this course of action. . . . If the instructor can still incorporate your grades into the grade for the course, please deliver them to the instructor by noon on Monday 15 January, 1996. If you have not performed your grading tasks, or it is too late to incorporate your grades, or if you fail to hand them in as requested in this letter, then your teaching assignment for the coming term, which was premised upon your acceptance of the duties associated with teaching at Yale, will be withdrawn.

On January 12, the PTAIs in the English Department received a letter from Linda Peterson, departmental chair. In it, she reviewed the fact that they had chosen not to turn in their grades for the courses taught in the prior semester and urged them to "reconsider" and do so. She went on:

> For those sections for which grades remain missing, the faculty of the English department has decided to complete grading. In order to do so, we ask that you return *all papers and exams,* graded or ungraded, now in your possession. We also ask that you return any grade records that might help us in assigning final grades . . . by Tuesday, January 16. . . (Emphasis supplied.)

Nilanjana Dasgupta, an international student in her fifth year in the Psychology Department, participated in the teaching fellowship program during four semesters.[11] In the fall of 1995, she was a teaching assistant in Psych 317 under Professor Diana Cordova. During the semester, she lectured twice, graded bi-weekly assignments, created part of the final research papers and met individually with students. She submitted the grades for the bi-weekly

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teach in the spring semester notwithstanding the grade strike and her concern that she might not be allowed to do so, remove any possible ambiguity.

[11] The Psychology Department was one of the few which required teaching as a degree requirement.

assignments to Professor Cordova as she would grade them, before the next class. The professor returned those assignments to the students at class.

The final paper for Psych 317 was due on December 1, purposely timed with the understanding that Dasgupta would grade and return them to Professor Cordova before she left for India in December 8.[12] By agreement with the professor, Dasgupta took half of those papers for grading. On December 8, she informed Professor Cordova of her participation in the grade strike, stating that she had completed grading the papers and would place the papers, together with her comments and grades, in the Union's office for safekeeping while she was out of the country. She gave Professor Cordova the phone number where she could be reached in India as well as the numbers for the GESO representative who would serve as her primary contact. She also left a memo for the students, informing them of her actions, and she departed for India on that same day. According to Dasgupta and fellow graduate student Wendi Walsh, the professor did not ask her to return the papers.

About December 11, Professor Cordova attempted, unsuccessfully, to have GESO return the papers which she understood Dasgupta to have placed with it for safekeeping. In fact, Wendi Walsh had the papers at her home and those papers were not returned in response to Cordova's request.[13] On December 13, Professor Carew, the departmental chair, called Dasgupta at her family's home in India. Professor Carew directed that she turn in both the papers and the grades by December 15, threatening adverse effects upon her career if she refused. She replied that she would contact her colleagues in New Haven to determine what she could do. She did not arrange for the papers and grades to be turned in, as Professor Carew had demanded.

About December 24, Dasgupta received a letter from Dean Appelquist, dated December 18. It recited that she had refused repeated requests to turn in the grade records and papers and threatened her with disciplinary sanctions under the University's disciplinary procedures. It also informed her that a disciplinary hearing would be held on January 10.[14] On December 29, she directed that the papers be handed in. They were, absent the grades. Professor Cordova completed the grading and turned the grades in to the Registrar by January 2.

On December 13, another TA, Chris Dumler, was requested by a visiting Professor, Tracy, to turn in the grades for mid-term exams and homework in his section. Tracy asserted that such information was University property. Dumler refused, noting that the "vote was to withhold our grades and evaluations of students for the term, not just the final grades for the class." On December 18, after they had completed the grading of a final exam in the German Department, TAs Nesheim and Knight were similarly requested to turn in copies of their grade sheets by Professor Hubrey. Each of these TAs refused to comply.

Over 100 teaching fellows participated in the grade strike. At least one, Jennifer Phillips,[15] withheld the grades with respect to one course, Art History, in which she was a TA,

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[12] There was also a final exam; however, because of her travel plans, Dasgupta was not asked to grade it.

[13] Both GESO officers and Dasgupta were aware that Walsh had, through simple procrastination, failed to turn the papers in to the Union office.

[14] Dasgupta returned early and at extra expense from her vacation, in order to attend the hearing. That hearing was postponed several times and ultimately canceled. She was never disciplined. At her own choosing, she did not participate in the teaching fellowship program in the spring of 1996.

[15] Phillips was a fourth year graduate student in the French Department and a GESO organizer.

while declining to participate in the strike with respect to another course in which she was serving as a PTAI, French 130.

The grade strike ended with GESO's capitulation on January 14. The grade sheets for all of the TAs and PTAIs were turned over to the Registrar on that day or on January 15.

IV. Analysis and Conclusions

A. The Parties' Contentions

Respondent asserts several bases for concluding that the grade strike was unprotected. First, it argues that it was a partial strike in that it began with its announcement on December 7 and, thereafter, the teaching fellows performed some of their duties while refusing to perform others. Further with respect to the partial strike contention, Yale argues that the partial strike character of the job action is demonstrated by the stipulated fact that the TAs and PTAIs intended to withhold the first semester grades for as long as it took to secure recognition and a commitment to bargain while simultaneously intending to resume or continue their teaching functions in the second semester. Second, Yale argues that that the strike was unprotected because it involved an arrogation of Yale's property. Finally, Yale contends that the particular conduct engaged in was insubordinate.

Counsel for the General Counsel contends that the teaching fellows were engaged in a full strike, protected by the National Labor Relations Act. Specifically, he contends that the strike did not commence until January 2, when the grades were due and that the teaching fellows withheld all of the labor required of them at that point, the actual turning in of the grades. He contends further that both the writing of recommendations and evaluations and the reporting of grades before the end of the semester were discretionary functions, such that the performance of, or the refusal to perform, those functions was not inconsistent with striking and that the teaching assignments for the first and second semesters constitute separate jobs such that working in the second semester was not inconsistent with a continued strike as to first semester employment. Counsel for the General Counsel also asserts that the grades and grade sheets were the property of the teaching fellows, not the University, and that the conduct engaged in was not insubordinate.

Additionally, the General Counsel and the Charging Party argue that dismissal upon Respondent's motion would be inappropriate because Respondent's threats were "overbroad," in that they restrained all strike activity and not merely that which was unprotected. Finally, the Charging Party argues that dismissal at this juncture would be inappropriate because Respondent condoned the grade strike, thus rendering any discipline assigned unlawful.

As discussed below, the Board's long-standing precedent compels me to reject the contentions of the General Counsel and the Charging Party and to grant Respondent's Motion to Dismiss.

B. Strike Activity-The Legal Parameters

That employees possess the right to strike as a means of achieving their lawful concerted goals, free from employer discrimination and retaliation, is undeniable. See *NLRB v. Fansteel Met. Corp.,* 306 U.S. 249, 256 (1939). Strike activity, however, is unprotected when it is "unlawful, violent, in breach of contract, or otherwise indefensible." *Keyway, a Division of Phase, Inc.,* 263 NLRB 1168 1169 (1982). Partial strikes and slowdowns are unprotected. *Restaurant Horikawa,* 260 NLRB 197, 198 (1982).

In *Valley City Furniture Company,* 110 NLRB 1859 (1954), the union engaged in one work stoppage (a refusal to work mandatory overtime hours) and announced its intention to regularly engage in similar refusals. The Board found this to be a plan to engage in a series of partial strikes and unprotected *from its inception.* It stated, at pages 1594 and 1595:

> The vice in such a strike derives from two sources, First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act.

See also, *Highlands Medical Center,* 278 NLRB 1097 (1986) (refusal by guards to clean up nails and glass from picket line and escort nonstriking employees through that picket line); *Audubon Health Care Center,* 268 NLRB 135 (1983) (refusal to cover work station left uncovered by absent employee, work the employees regularly performed); *John S. Swift Company,* 124 NLRB 394, 396 (1959) (repeated refusals to work mandatory overtime).

Employees do not retain their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks and disadvantages of a complete strike action. *Vic Koenig Chevrolet,* 263 NLRB 646, 650 (1982) (refusal to perform struck work). They must choose between working and striking. *Pacific Telephone and Telegraph Company,* 107 NLRB 1547, 1549 (1954) ("hit and run" work stoppages). When they strike, they must be willing "to assume the status of strikers-a status contemplating a risk of replacement and a loss of pay." *Polytech, Incorporated, supra* at 696. They must be willing to engage "in a total strike with the loss of wages and risk of lawful replacement incident thereto." *Phelps Dodge Copper Products Corporation,* 101 NLRB 360, 368 (1952) (slowdown). An employee "may not continue to work and at the same time strike." *Classic Products Corporation,* 226 NLRB 170, 177 (1976).

Where, however, the duties which the employees refuse to perform are voluntary or discretionary, the refusal to perform them cannot be deemed a partial strike. Thus, in *Riverside Cement Co.,* 296 NLRB 840 (1989), the employees' refusal to provide their own tools, where the providing of personal tools had always been discretionary, was deemed protected concerted activity and not an unlawful partial strike. Similarly, the refusal to work voluntary overtime is a protected activity, not a partial strike. *Jasta Manufacturing Company, Inc.,* 246 NLRB 48 (1979); *Dow Chemical Company,* 152 NLRB 1150 (1965). And, where the refusal occurs but once, so that it cannot be said that the employees intended to engage in recurrent work stoppages, there is no partial strike or loss of statutory protection. *Polytech, Incorporated,* 195 NLRB 695, 696 (1972).

Sitdown strikes, where employees occupy the employer's facility and refuse to leave when asked, do not enjoy the Act's protection. The most extreme example is *NLRB v. Fansteel, supra.* Therein, a large group of employees seized and possessed key buildings, holding them for more than a week. During that time, they ousted and excluded representatives of management and perpetrated acts of violence and vandalism. A less extreme example, also resulting in a loss of the Act's protection, is *Waco, Inc.,* 273 NLRB 746 (1984). In that case, the employees remained in the employer's lunchroom for more than 3 hours, mostly subsequent to having been told that the employer would not accede to their demand for a group meeting and after having been ordered to either return to work or leave. Similarly, in *Cambro Mfg. Co.,* 312 NLRB 634 (1993), a group of employees ceased work in mid-shift (between 2:30 and 3:00 a.m.) and remained in the lunchroom, demanding an immediate meeting with the employer. They were assured that they could meet with the employer after the end of their shift (7:00 a.m.) and were ordered to return to work or clock out. They rejected these demands and were discharged. The Board found their protest unprotected. In so doing, it quoted the following language from *Molon Motor & Coil v. NLRB,* 965 F.2d 523 (7th Cir. 1992):

> . . . Not every work stoppage is protected activity, however; at some point, an employer is entitled to assert its private property rights and demand its premises

> back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake. [Citations omitted.]
>
> Drawing that line requires courts to balance "whether the means utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act. [16]

See also, *Mal Landfill Corporation,* 210 NLRB 167 (1974), in which a work stoppage wherein the employees' closed the gates for a period of 20 minutes, preventing both egress and ingress, was held unprotected.

Similar to the sitdown strike cases, and more apposite here, are those in which the striking employees withhold the employer's goods or materials. In *Beacon Upholstery Company,* 226 NLRB 1361 (1976), a group of salesmen went on strike, taking with them the employer's essentially irreplaceable sample books as well as order forms and price lists. They retained those items, the importance of which they were well aware, even after repeated demands that they be returned. The Board held, at page 1366:

> The employees' action . . . was not protected by the Act, and Respondent would not have violated the Act if it discharged those employees *solely* because they had withheld that material. If in fact the discharge was solely for that reason, it would not matter whether or not Respondent had requested the material or notified the employees that they would be discharged unless they returned it.

The withholding of these materials was found to be the sole reason for the discharges and the complaint's allegations of discriminatory discharges were dismissed. Similarly, in *Keyway, a Division of Phase, Inc.,* 263 NLRB 1168, 1169, (1982), at fn. 9, the Board, in *dicta,* noted that the conduct of employees in leaving work while retaining the keys to file cabinets to which the employer needed immediate access, "makes a strong case for a finding that the employees exceeded the bounds of permissible conduct," citing *Beacon Upholstery, infra.*

Other cases, however, establish that not all "sitdown" strikes lose statutory protection. In *Advance Industries Division,* 220 NLRB 432 (1975), five employees returned to work following a conventional strike. On the day of their return, to what they had been told was their regular shift, they had expected to work until midnight. However, part way into the shift, they were informed that they would be sent home at 10:00 p.m. In protest, they refused to leave; instead, after their 10:00 p.m. break, they returned to their machines and resumed work. They were ordered to leave, clocked out by a supervisor and finally arrested and expelled by the police. The Board expressly rejected the analogy to *Fansteel* and found that they had not forfeited the Act's protections. It noted that the employees only occupied the facility for 45 minutes, that during that time they did not bar access to or exclude management, that they continued to seek to discuss their concerns with management, that their actions were entirely nonviolent, and that "[t]hey did not interfere with production." Similarly, in *NLRB v. Pepsi-Cola Bottling Co. of Miami,* 449 F.2d 824, 829 (5th Cir. 1971), enfg. 186 NLRB 477 (1970) and in *Roseville Dodge v. NLRB,* 882 F.2d 1355 (8th Cir. 1989), enfg. sub nom. *City Dodge Center,* 289 NLRB 194 (1988), employees engaged in brief work stoppages wherein they refused the employers' orders to leave or return to work. In both of these cases, it was noted that they did not "seize

[16] In Member Devaney's dissent in *Cambro*, he likened the facts to *NLRB v. Pepsi-Cola Bottling Co. of Miami,* 449 F.2d 824, 829 (5th Cir. 1971), enfg. 186 NLRB 477 (1970) and *Roseville Dodge v. NLRB,* 882 F.2d 1355 (8th Cir. 1989), enfg. sub nom. *City Dodge Center,* 289 NLRB 194 (1988), discussed below, noting particularly that the *Cambro* strikers had not interfered with the work performance of nonstriking employees.

the plant or machinery" in "defiance of the employer's right of possession," they were nonviolent and *they did not interfere with the work performance of nonstriking employees*. In each of those cases, the Board found that the employees had not lost the Act's protections, conclusions enforced by the courts.

C. Application of the Law to the Facts

1. Partial Strike-Working While Striking

GESO announced the grade strike on December 7 and to at least some of its officers, it began on that date. The expressed intent was to complete the teaching fellows' work for the semester but, on the due date, refuse to turn in the final grades (including grades for exams and papers completed earlier during the term), with the hope that the University would commit to good faith negotiations by that time. Thereafter, many of the teaching fellows did just that, performing all of their teaching duties until the deadline for grades, at which point they refused to submit the final grades for the semester.[17] Several TAs were given deadlines as early as December 13 or were asked to turn in the students' mid-term and final work and grades; those TAs refused to comply, because they were on strike.

I reject the argument that, because the teaching assistants were not generally asked to turn in grades or papers before the end of the semester, they had the discretion to refuse to do so. The discretion in this case rested with the instructors, to ask for grades and papers during the term or not. [18] That instructors did not require that grades and papers be turned in until the strike made it essential that they take possession in order to complete *their* work for the semester (grades were, after all, their responsibility) did not give the TAs the option to refuse. This case is thus distinguishable from such cases as *Riverside Cement, supra, Jasta, supra,* and *Dow, supra,* where overtime or the providing of one's own tools was within the employees' discretion.

Even after the deadline, the TAs were prepared to write, and apparently wrote, letters of evaluation and recommendation for the students they taught in the first semester. The writing of evaluations and letters of recommendation for their students is a job function which I have found to be a regular, if not required, aspect of their work. The TAs and PTAIs continued to perform this function, even committing to write such letters for concerned seniors after the January 2 deadline for grades (i.e., when GESO contends the strike began). At least one TA, Sarah Rich, acknowledged that she may have written such letters after January 2. Counsel for General Counsel argues that the writing of such recommendations was voluntary and thus, like the *refusal to perform* a voluntary act, the *performance* of a voluntary act is not inconsistent with fully striking. I must reject this argument. The refusal to perform a discretionary duty is plainly distinguishable from striking while continuing to do it.[19] Moreover, what the teaching fellows were offering to do on behalf of their students was to write letters and evaluations which would take the place of the grades. They were offering to complete their duties, in their own fashion, for Yale's "customers" while refusing to perform those duties for, and in the manner directed by, Yale.

The teaching fellows also prepared to teach the courses they had been assigned for the

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[17] The TAs and PTAIs accepted their salaries for the full semester, receiving at least one check after January 2. However, I cannot hold this against them as evidencing a partial strike. Respondent could have withheld all or part of that last paycheck but did not do so.

[18] Some TAs, such as Dasgupta, were required to submit the grades as the semester progressed.

[19] To illustrate, a striker could not, consistent with normal strike activity, refuse to work his or her regular shift but insist on working voluntary overtime hours.

spring semester and fully expected to teach those courses even in the highly probable event (given Yale's adamant position regarding recognition) that the grade strike was still continuing. I am convinced that one cannot separate each semester's teaching into distinct jobs. I reject the assumption that the teaching assignment in one semester was a discrete period of employment such that the teaching fellows could continue to maintain a strike with respect to it while teaching in the next semester. If the teaching fellows were employees, their employment was to teach, not just to teach one specific course. They frequently received their teaching assignments for both the fall and spring semesters at one time, during the preceding spring semester, and they sometimes taught courses in the spring semester which were continuations of courses begun the preceding fall.[20]. Yale argues, and I agree, that they are akin to seasonal employees who work in distinct periods according to the employer's needs. Where such employees have a reasonable expectation of future employment they are included within the bargaining unit, demonstrating a continuing employer-employee relationship. See *L & B Cooling,* 267 NLRB 1, 2 (1983); *Maine Apple Growers, Inc.,* 254 NLRB 501, 502-503 (1981).[21] I also note that all of the graduate students appear to have been eligible to vote for GESO representation in the election conduct in April 1995 and to vote for or against the grade strike, whether or not they were currently serving as teaching fellows. This demonstrates that, to the GESO leadership at least, there was a continuing employer-employee relationship throughout the students' years of graduate study.

Moreover, Yale was not required to wait and see whether the teaching fellows would report for work in the second semester while continuing to withhold the first semester grades. They had clearly announced their intention to do so and that is sufficient. *Sawyer of Napa,* 300 NLRB 131, 137 (1990); *Valley City Furniture, supra* at 1595.

Based on the foregoing, I am compelled to conclude that the grade strike was a partial strike, unprotected by the Act. The strike, I find, began with its December 7 announcement or, at the latest, by December 13, when TAs began to refuse directives to turn in the grades which they had already assigned to the student work. Some of them turned in their grades to GESO, not the Registrar, an act which, I find, further evidences that the strike had begun. After it began, they continued to perform virtually all of their job duties and they accepted their pay for that work. And, they planned and intended to resume teaching in the spring semester while continuing to strike, if they had not achieved their objectives by that time. Thereby, they were engaged in an activity which was "neither strike nor work." *Valley City Furniture, supra* at 1594-1595.

2. Withholding the University's Property

Grades evidence student achievement. They are the basis upon which students pass

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[20] In his opposition to Respondent's reply brief, General Counsel attached a position letter submitted by prior counsel on Yale's behalf during the investigation of this unfair labor practice charge and asked that it be received in evidence as GC Exh. 251. It is received. In that position statement, Yale's then counsel asserted, in arguing against a condonation theory, that the fall and spring semesters were distinct periods of employment. While this "admission" may have some probative weight, I find that it is contrary to the evidence established on the record. Moreover, while it may demonstrate that there was a change in legal theory, it does not evidence that Respondent's claim of a partial strike is pretextual.

[21] Applying the factors applicable to seasonal employees as set forth in these cases, I note that Yale draws all of its teaching fellows from within the local graduate student community, has an essentially stable need for teaching fellows, and regularly re-employs the graduate students for successive semesters or "seasons."

from one level to another, receive their degrees and are awarded honors. They are the basis for the credentials awarded by Yale as a credentialing institution. Yale argues, and I agree, that the University has a strong property interest in the students' grades. The General Counsel and GESO argue that the grade sheets, upon which they recorded those grades, were the property of the teaching fellows, which they could lawfully withhold. That argument, I find, fails to accord proper significance to the grades themselves as distinguished from the paper on which they were recorded.

The grades, however incorporeal they may be, are separate from the teaching fellows' grade sheets. They are also more than the teaching fellows' mental processes. They are, in certain respects, that which is produced by a semester of teaching.[22] To withhold those grades is essentially to withhold an aspect of the semester's production. The withholding of the goods produced, whether grades or widgets, as distinguished from the refusal to produce additional goods, is not a lawful element of a strike. It is essentially like the conduct condemned in *Fansteel* and other sitdown cases,[23] and such cases as *Beacon Upholstery,* where employees not only refused to work *but also interfered with the performance of the nonstriking employees* by preventing access to the plant or by withholding from the employer materials essential to the performance of the work by others. In this case, by withholding the grades, including grades assigned for mid term examinations, quizzes and papers, the teaching fellows interfered with the work of the course instructors and university administrators whose function it was to assign, issue and ultimately distribute those grades.[24]

Moreover, even assuming that the strike did not begin until January 2, and even assuming further that the first semester was a discrete period of employment, they so timed their action as to totally insulate themselves from "the loss of wages and the risk of lawful replacement" which are incident to a total strike. *Polytech, supra; Vic Koenig Chevrolet, supra; Phelps-Dodge, supra.* No one else could step in, as their replacements, and assign those grades This is not a case where, like professional athletes, the striking workers were irreplaceable because of their skill level or popularity. Neither is it a case of employees striking at a critical moment. The teaching fellows could no longer be replaced after January 2 because only they had observed the classroom performance of the undergraduates and only they had read and evaluated their work. They took those observations and evaluations with them when they struck. This case is thus distinguishable from *Leprino Cheese Mfg. Co.,* 170 NLRB 601, 606-607 (1968) where the employees' conduct in striking at a critical point in the production process, causing economic loss to their employer, was deemed protected. If they are comparable to Leprino's cheesemakers, the teaching fellows did not merely leave the cheese unfinished, they took with them the milk and other ingredients from which the cheese is made.

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[22] To say this is not to denigrate that which is the real "product" of education, learning and growth. An admittedly poor analogy could be drawn between teaching and programming a computer to solve a problem. The semester's learning could thus be equated to the program "learned" by the computer, the final examination to the process by which the computer solves the problem for which the program was intended, and the solution of that problem to the grade assigned for the work. The solution belongs to the employer, regardless of who owns the paper in the printer.

[23] Absent the violence, of course. The grade strike was entirely nonviolent. Violence, however, is not a critical element in the unlawfulness of a sitdown strike. See, for example, *Cambro, supra,* and *Waco, supra.*

[24] Contrary to the General Counsel's contention, there was no way that Yale could have effectively engaged in self-help and substituted others to compile grades accumulated throughout the semester. Indeed, in those instances of record where instructors sought the underlying materials or mid-term grades to attempt to do just that, they were rebuffed.

Thus, I must conclude that the teaching fellows were engaged in a partial strike. They could not invoke the Act's protections for striking while continuing to perform some of their duties in the first semester and/or striking with respect to the fall semester while intending, and preparing, to teach in the spring semester. Neither could they claim the Act's protections while withholding the semester's grades, which I find to be University property.

Accordingly, the statements made by Yale's supervisors and agents to discourage the teaching fellows from engaging in the grade strike, while undoubtedly coercive,[25] were not violative of the Act. Similarly, any discipline assigned for participation was not discriminatory.

3. Alleged Insubordination

Respondent argues, additionally, that the grade strike constituted insubordination and was therefore unprotected. It is inappropriate, I believe, to apply the concept of insubordination to strike activity. A lawful strike will almost always be conducted contrary to the wishes of the employer. As such, it may be said to be insubordinate but is protected nonetheless. A strike which is violent, in breach of contract, less than complete or a sitdown is unprotected for the reasons discussed *supra,* without involvement of the concept of insubordination.[26]

4. Overbroad Threats

Both the General Counsel and the Charging Party argue that at least some of the threats attributed to Yale's agents were directed at any work stoppage or other protected concerted activity generally, and thus warrant denial of the motion to dismiss and, ultimately, a remedial order even if the grade strike is found to be unprotected. They point to the following evidence, contending that each includes an overbroad threat:

1. The December 12, 1995 letter from Deans Appelquist and Brodhead to graduate students with teaching responsibilities, stating that "[t]he failure to perform the tasks of evaluating student work and reporting grades in a timely fashion is a serious breach of academic responsibility [which] should be expected to bear on the evaluation of the graduate student instructor's performance as a teacher and on the assessment of his or her suitability for teaching appointments during the spring semester.
2. Expressions by the faculty of the French Department, about December 12, 1995 concerning the appropriateness of the union model in the academic setting and the loss of teaching appointments in the spring semester.
3. December 14 statements by the Director of Graduate studies in the French Department about the grade strike and the place of unions in academe.

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[25] A number of these statements were in writing and are thus do not require a credibility analysis. I have not, of course, resolved issues of credibility which would only become apparent if the verbal statements were to be disputed upon presentation of Respondent's case-in-chief.

[26] The cases cited by Respondent did not involve strike activity and are thus inapposite. *Carolina Freight Carriers Corp.,* 295 NLRB 1080 (1989) involved a single employee's persistent refusal to obey his supervisor's order to clock out and leave work, not a concerted refusal to work. *Bird Engineering,* 270 NLRB 1415 (1984), involved a group of employees who disobeyed a rule prohibiting them from leaving the plant during their lunch hour. The Board expressly found that they were not engaged "in a strike, withholding of work or other permissible form of protest." They simply chose to ignore the employer's rules. *G & H Products, Inc.,* 261 NLRB 298 (1982) involved deferral to an arbitrator's finding that a union steward had been insubordinate in advising of other employees to engage in the insubordinate act of failing to obey the employer's order that they properly fill out their timecards.

4. The December 15, 1995 letter from the French Department faculty to graduate students with current or eventual teaching assignments, wherein it was stated that "[f]ailure to perform any aspect of a graduate teaching assignment - - e.g. meeting all classes, grading and returning all papers . . . would (1) be a *de facto* dereliction of professional duty to our students . . . and (2) constitute behavior unacceptable anywhere in the profession for which graduate teaching is an apprenticeship." That letter went on to suggest that "any failure of this kind . . ." could be considered in faculty evaluations and possibly jeopardize future teaching opportunities.

5. Professor Westerfield's statements on December 18, 1995 concerning the inappropriateness of the strike weapon in the academic setting and the possibility that such conduct could give rise to negative evaluations and loss of future teaching positions.

They cite *New Fairview Hall Convalescent Home,* 206 NLRB 688, 747 (1973), enfd. 520 F.2d 1316 (2nd Cir. 1975) in support of this contention. In that case, employees engaged in unprotected partial strikes in the course of a large and otherwise protected organizing campaign. The employer responded to that campaign with numerous coercive statements unrelated to the partial strikes, including threats to close the plant, interrogations, and solicitations to abandon the union, and with 8(a)(3) violations. The employer's statements and warnings which responded to the partial strikes, however, were held nonviolative except for one statement uttered in that context which could have been understood by employees to prohibit all otherwise protected activities.

I find *New Fairview Hall* distinguishable from the instant case. There, the employees engaged in some unprotected strike activity in the course of an otherwise protected campaign for recognition. Here, the entire campaign consisted of the grade strike, conduct which I have found to be unprotected. Moreover, each of the statements relied upon as overbroad referred to or was derived from the grade strike, as was alleged in the General Counsel's complaint.[27]

Thus, the December 12 Appelquist/Brodhead letter begins with the statement, "Certain graduate students have announced plans to withhold grades in undergraduate courses in which they have teaching responsibilities." It goes on to state, "In the name of the educational values we all share, we urge anyone contemplating the non-submission of grades . . . to submit your grades in the usual manner." It is in this context that they then speak of "[t]he failure to perform the tasks of evaluating student work and reporting grades in a timely fashion [as] a serious breach of academic responsibility [which] should be expected to bear on the evaluation . . . as a teacher and on the . . . suitability for teaching appointments during the spring semester."

Similarly, the December 12 meeting in the French Department was expressly held to deal with the grade strike. In that meeting, the threatened loss of spring appointments was solely related to participation in the grade strike and the statement concerning the appropriateness of the union model in the academic setting was a distinct expression of opinion, protected by 8(c). There was no threat implied or expressed concerning adverse consequences for supporting a union or seeking representation. The December 14 statements

[27] The complaint, paragraph 9, alleges that "From about January 2 to January 14 . . . Part-time Acting Instructors and Teaching Fellows . . . ceased work concertedly and engaged in a strike." Paragraph 10 alleges various threats "if [the employees] engaged in the strike described above in paragraph 9" and paragraph 11 similarly alleges threats directed against the teaching fellows "if they did not cease the strike described above in paragraph 9." Encompassed within these paragraphs are the threats now contended to be overbroad because they could allegedly be understood to restrain conduct beyond the strike "described above in paragraph 9."

were uttered when students sought clarification of the December 12 meeting; any threats made therein related solely to participation in the grade strike and not to unionization in general. The December 15 letter was, expressly, a further follow-up to the December 12 meeting.

And, the meeting at which Professor Westerfield spoke on December 18 was also expressly "about the grade strike." In that meeting, he candidly expressed his strongly negative opinion about the use of the strike weapon by teachers. However, his threats of adverse recommendations and redesign of his courses to eliminate teaching fellows were related to the teaching fellows "do[ing] this" or engaging in "this action," i.e., engaging in a grade strike.

Thus, I find that there were no "overbroad" threats directed against the exercise of protected activity, even assuming that *New Fairview Hall* would mandate that such threats be found violative. I would further find that, even if one or two of these statements were to be deemed technically overbroad, they should be considered isolated and *de minimus* in the context of this litigation and hardly worth returning for many days of hearing, briefs and a decision on the many other issues raised by this complaint.

4. Condonation

Charging Party contends that, by extending the deadline for the submission of final grades, Yale condoned the actions of those teaching fellows who met the extended deadline, thus precluding discipline, citing *Asbestos Removal, Inc.,* 293 NLRB 352, 356 (1989) and *Jones & McKnight, Inc.,* 183 NLRB 82, fn. 3, 89-90 (1970). In each of those cases, the employees had engaged in unprotected walkouts. In *Asbestos Removal,* condonation was found where the employer had stated, as they were walking out, that there would be a meeting to discuss their concerns on the following day, that there would probably be work on the day after that and that the employer would get in touch with them. In *Jones & McKnight,* condonation was found upon an express promise to forgive unprotected conduct if the striking employees would cease their picketing and allow other employees to come to work.

As the trial examiner quoted in *Jones & McKnight*:

> Condonation is a question of fact, and a determination of whether an employer has forgiven unprotected activity of its employees requires an evaluation of all the relevant conduct. [Citing and quoting from *M. Eskin & Son,* 135 NLRB 666, 667] Also, condonation requires a demonstrated willingness to forgive the improper aspect of concerted action, to wipe the slate clean. After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise discriminate against, them. [Citing and quoting from *Confectionery & Tobacco Drivers and Warehousemen's Union . Local 805,* 312 F.2d 108 (C.A.2).

Condonation requires "clear and convincing evidence "of an agreement to "wipe the slate clean" and "is not to be lightly inferred." *International Paper Company,* 309 NLRB 31, 38 (1992).

Here, the teaching fellows engaged in what I have found to be an unprotected strike. Upon its conclusion, eight who had been PTAIs in the fall 1995 semester allegedly suffered discriminatory reassignments, dissolution of their courses and/or greater supervision. One teaching assistant, Dasgupta, was made the subject of disciplinary charges.

The record reflects that, on January 10, Dean Appelquist extended to January 15 the deadline for the TAs to turn in their final grades. He warned that, if they failed to do so, their "eligibility for a teaching assignment for the coming term will be withdrawn." While it is implicit that such eligibility would not be withdrawn if they complied (as they did), he made no other promises or assurances of forgiveness. Neither did he condone any conduct beyond the withholding of final grades. Only one TA, Dasgupta, is alleged to have suffered discriminatory treatment. That discrimination consisted of Yale's instituting of disciplinary proceedings against her. Those proceedings were instituted on December 18, *before* the alleged condonation, and were based on her refusal, upon request, to turn over both the grades and the graded papers as well as her delivery of the grades and papers to the Union office. Her hearing was postponed from January 10 to January 15 and from January 15 to January 31. On January 22, Dean Appelquist informed Dasgupta that, with the grade strike behind them, he had decided to "withdraw [her] case from consideration by the Committee on Regulations and Discipline." This record does not support a conclusion of condonation of her actions. Even if it did, the Dean's actions constituted effectuation of the condonation.

All of the remaining alleged discriminatees were PTAIs. Their deadline for the submission of final grades had only been extended to January 9, a deadline they did not meet. In the English Department, where four of the eight PTAIs were teaching, another "deadline" had issued. On January 12, the departmental chair asked them to "reconsider . . . and assign . . . the grades . . . " Short of that, she asked that they return all papers and exams, and any grade

records, so that the English Department faculty could complete the grading process, by January 16. There was no promise, express or implied, of forgiveness. All the teaching fellows, including the English Department PTAIs, turned in their final grades on January 15.

The foregoing evidence, I find, falls short of establishing condonation, even for those PTAIs in the English Department. Unlike the employers' statements in *Asbestos Removal* and *Jones and McKnight,* there were no statements made from which the PTAIs could conclude that their unprotected conduct would be overlooked or forgiven if they complied with their department's request.

5. Conclusion

I find, as a matter of law, that the teaching fellows, whatever their employee status, were not engaged in a protected strike activity, for each of the reasons set forth above, and that the General Counsel has thus failed to establish an essential element to his *prima facie* case. This hearing has, thus far, occupied 15 trial days, with over 30 witnesses and nearly 400 exhibits. It may well be anticipated that to conclude this hearing with the Respondent's case-in-chief and possible rebuttal will occupy at least as much time and require at least as much effort on the part of all of the parties. Given my conclusion that the General Counsel's case must fall as a matter of law, I further find that judicial economy and administrative efficiency warrant that I grant Respondent's motion to dismiss at this stage of the proceeding.[28] Accordingly, I make the following:

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[29]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. August 6, 1997

Michael O. Miller,
Administrative Law Judge

[28] *Sun Electric Corporation.,* 266 NLRB 37, 45 (1983); *Cherry Rivet Company,* 97 NLRB 1303, 1304, fn.1 (1951).

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.